Supreme Court of the United States

OCTOBER TERM, 1957

No. 29

THE UNITED STATES,

Petitioner,

vs.

CENTRAL EUREKA MINING COMPANY (A CORPORATION), ALASKA-PACIFIC CONSOLIDATED MINING COMPANY, IDAHO MARYLAND MINES CORPORATION, HOMESTAKE MINING COMPANY, BALD MOUNTAIN MINING COMPANY, ERMONT MINES, INC.,

Respondents.

PETITION OF THE RESPONDENTS FOR REHEARING

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August 22, 1958.

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

PETITION.

The respondents petition the Court for rehearing herein.

Grounds for the requested rehearing.

The grounds for the petition are as follows:

1. The basic issue in these cases was one of fact as to the purpose for which Order L-208 was promulgated. That issue was determined in favor of the respondents by the Court of Claims, which found that the sole objective of the Order was "*the releasing of mine labor from the gold mines*[1] for employment in mines that were producing other metals". This Court has held that in fact the primary purpose of L-208 was "*to conserve the limited supply of equip-*

[1] Italics are supplied herein unless otherwise indicated.

ment used by the mines". On the basis of that conclusion of fact the Court has ruled that L-208 was a "reasonable regulation" to conserve mining equipment.

2. The Finding of the Court of Claims as to the purpose of L-208 is overwhelmingly supported by the record.

3. This Court's holding as a matter of fact that it was the primary purpose of L-208 to release scarce mining equipment for use in essential industries is in direct conflict with the Finding of the Court of Claims, wholly without support in the record, and incorrect in fact.

4. This Court does not appear to have held that it was a purpose of L-208 to conserve *critical materials*, such as "mercury, molybdenum, tungsten, vanadium, chromium, manganese, etc." or "mercury, drill steel, etc.", as distinguished from *mining equipment (including machinery)*. The Finding of the Court of Claims that L-208 was not issued for the purpose of conserving critical materials is overwhelmingly supported by the record.

5. This Court has held as recently as 1949, in *United States* v. *Penn Foundry & Manufacturing Co. Inc.*, 337 U. S. 198, 207-208, that this Court has only a limited power of review of judgments of the Court of Claims in Tucker Act cases, and that, with certain exceptions specified in *Penn Foundry & Manufacturing Co. Inc.*, this Court is bound by findings of fact of the Court of Claims. In effect, however, the Government sought and obtained a trial of these cases *de novo* in this Court, which reached a conclusion as to the purpose of L-208 for which there is no support in the record.

6. L-208 cannot be sustained as a regulation. It was not in fact issued as a regulation of mining equipment and it cannot be sustained as a regulation of mine labor because there was no authority to regulate such labor. In fact and law the closing of the gold mines was a "taking", effected in order to maneuver manpower.

I.

The respondents' case is based squarely on the propositions that, as the Court of Claims found, the only purpose for which L-208 was promulgated was "the releasing of mine labor from the gold mines for employment in mines that were producing other metals" (Finding 46, R. 105-106);[2] that the reference in the preamble of the Order to "critical materials" was camouflage;[3] and that, as the Court of Claims said (R. 145), "what the WPB said it was doing and what it in fact and law did were two different things".[4]

This Court's reversal rests upon a holding by this Court that in fact the primary purpose of L-208 was "to conserve the limited supply of equipment used by the mines", although the WPB also "hoped that its order would divert miners to more essential work" (357 U. S. p. 169). On the basis of that conclusion of fact, the Court ruled that L-208 was a "reasonable regulation" to conserve the limited supply of equipment used by the mines (*id.*).[5]

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[2] The Court of Claims spoke in Finding 46 of "*The* dominant consideration * * * in the issuance of Limitation Order L-208" (R. 105-106). In speaking of "*The* dominant consideration", the Court clearly meant the *only* purpose of the Order (Respondents' brief, Appendix A, p. 34-39; see also dissenting opinion of Mr. Justice Harlan, 357 U. S. 179-180).

[3] Respondents' brief, p. 3-4, 30-34, 70, 97-101.

[4] Respondents' brief, p. 33 and Appendix A thereto, p. 36.

[5] The Court's opinion says (p. 169):

> "The WPB here sought, by reasonable regulation, to conserve the limited supply of equipment used by the mines and it hoped that its order would divert available miners to more essential work."

The opinion also says that (p. 167):

> "The record shows that *a* dominating consideration in the issuance of L-208 was the expectation that it would release experienced miners for work in the nonferrous mines, but the record does not support a finding that such was the sole purpose of the order." (Italics in the original).

II.

The Finding of the Court of Claims that the purpose for which L-208 was issued was "the releasing of mine labor from the gold mines for employment in mines that were producing other metals" is overwhelmingly supported by the record.

The documentary evidence and uncontradicted oral testimony leave no doubt as to the correctness of what the Court of Claims said in its opinion (R. 19):

> "The record establishes that no one having anything to do with the issuance of L-208 believed that it was devised or intended to be devised for the purpose of conserving critical materials, equipment or supplies, inasmuch as existing preference orders had solved that problem in connection with the gold mines."

The Order was issued on October 8, 1942 (Finding 43, R. 102). The contemporaneous record discloses its purpose.

On October 1, 1942, five days before the WPB meeting at which the issuance of L-208 was formally decided upon (Finding 41, R. 100-101), representatives of the gold mine operators were called to Washington and told by the Vice Chairman of the WPB "that a decision had been made to close the gold mines in order to transfer the released labor to the copper mines" (Finding 36, R. 97-98). They met for five hours with representatives of the WPB, the War Department and the War Manpower Commission. The meeting was concerned *solely* with the question whether manpower needs made it necessary and appropriate to issue an order closing the gold mines. There was no discussion at all of the possibility of issuing such an order for any other purpose (Finding 36, R. 97-98; R. 605-611).

The minutes of the meeting of the WPB held on October 6, 1942, at which it was agreed that the closing order should be issued, confirm that the purpose of the Order

was to put gold miners out of work so that they "would be released for work elsewhere" (Finding 41, R. 100-101). There is no suggestion in the minutes that L-208 had any other purpose.

Moreover, the record contains four explicit contemporaneous statements of the "manpower" purpose of the Order which were made, respectively, by (1) the Chairman of the WPB and the Chairman of the War Manpower Commission, jointly, (2) the Under Secretary of War, (3) the Commanding General, Services of Supply, United States Army and (4) the Chief of Staff of the United States Army.

1) Plaintiff's Exhibit 34, R. 430, 1323—Joint statement of Paul V. McNutt and Donald M. Nelson, issued October 8, 1942 (Finding 45, R. 105):

"To meet our war production program with respect to these [nonferrous] metals, it becomes necessary now to maneuver our manpower so that less essential mining can be diverted to vitally important operations. With this as our objective it has been determined that all gold mining shall be discontinued at the earliest possible moment."

2) Plaintiff's Exhibit 132, R. 612-613, 1516—Telegram, October 10, 1942, Under Secretary of War to Homestake Mining Company:

"FACED WITH A SERIOUS SHORTAGE OF COPPER AND MOLYBDENUM FOR OUR ARMAMENT PROGRAM STOP THE WAR PRODUCTION BOARD HAS ORDERED THE CLOSING OF GOLD MINES TO PROVIDE ADDITIONAL TRAINED LABOR FOR THE NON FERROUS METAL MINES STOP • • •"

3) Plaintiff's Exhibit 127, R. 520, 1510-1511—Letter, October 11, 1942, General Somervell to Senator Gurney:

"The gold mining industry has been singled for curtailment only because it constitutes the most readily available pool of 'hard rock' miners who are so urgently needed to further the war effort."

4) Plaintiff's Exhibit 128, R. 523, 1511-1512—Letter, October 12, 1942, General Marshall to Senator Gurney:

> "It is my understanding that the War Production Board has ruled that the gold mining industry be closed down in the hopes that this action will release experienced mine labor for employment in the mining of the basic strategic materials essential to our war production program."

The foregoing are only some of the items which constitute the overwhelming support in the record for the Finding of the Court of Claims as to the purpose for which L-208 was issued.* In Appendix A hereto we quote, from the Findings, ten statements made in writing by responsible Government officials over the period from July 4, 1942, through October 5, 1942 which confirm the "manpower" purpose of the Order.

III.

This Court's opinion holds that it was the primary purpose of L-208 to release *scarce mining equipment* for use in essential industries and the Court concluded that "The WPB here sought, by reasonable regulation, to conserve the limited supply of equipment used by the mines * * *" (p. 169).

The statements in the opinion are in direct conflict with the Finding of the Court of Claims, wholly without support in the record, and incorrect in fact. This Court appears to have relied upon unsupported assertions in the petitioner's brief.

This Court said in its opinion (p. 166):

> "The record shows that the WPB expected that L-208 would release substantial amounts of scarce

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*See respondents' brief, p. 3, 13-18, 44, 68 and Appendix A thereto, p. 2-39.

> mining equipment for use in essential industries * * *."

There is no evidence that, in issuing L-208, the WPB had any such expectation.

In its opinion this Court also said (p. 167):

> "The WPB could properly rely on the profit motive to induce the mine owners to liquidate their inventories, and it was thought that the people who would be interested in purchasing used mining equipment probably would be the owners of essential mines."

There is no evidence that before issuing L-208 the WPB ever gave thought to the question whether the owners of essential mines would be interested in purchasing used mining equipment or gave any consideration to the question whether the profit motive would induce mine owners to liquidate their inventories.

This Court also said (p. 168):

> "Thus the WPB made a reasoned decision that, under existing circumstances, the Nation's need was such that the unrestricted use of mining equipment and manpower in gold mines was so wasteful of wartime resources that it must be temporarily suspended."

There is no evidence that when issuing Order L-208 the WPB decided that the unrestricted use of mining equipment was so wasteful of war time resources that it ought to be suspended.

At no time has the Government cited, and this Court's opinion does not cite, any evidence in the record, written or oral, which even suggests that when the WPB issued L-208 it acted in the expectation that the Order would release significant amounts of scarce mining equipment for use in essential industries.

Findings 18 through 42, which take up 27 pages of the record and embody full quotations from the pertinent documents of the three months preceding the issuance of L-208, as well as from the minutes of the WPB meeting of October 6, 1942 at which the issuance of the Order was decided upon, contain no significant reference to mining equipment (R. 75-102).[7]

The Government did not contend before the Court of Claims, or in its petition for certiorari, that it was a purpose of L-208 to release scarce mining equipment; that contention was made for the first time in the Government's brief on the merits, in which the Government relied for the first time on Priorities Regulation 13 and two amendments of L-208 which were adopted on November 19, 1942 and August 31, 1943.[8] The thesis advanced in the Government's brief that Priorities Regulation 13 (which is not in the record and was not discussed before the Court of Claims) restricted sales of mining equipment by the gold mines is untenable and is not referred to in this Court's opinion (see Appendix B hereto). The two amendments of L-208, which are mentioned in the opinion, have no tendency to establish that in issuing the Order the WPB acted in the expectation that the Order would release scarce mining equipment (see Appendix B hereto).

While a minute of the WPB meeting of June 15, 1943 indicates that at that time the WPB took cognizance of a relatively small diversion of used mining equipment to

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[7] In the minutes of the WPB meeting of October 6, 1942, there is no reference whatever to mining equipment (Finding 41, R. 100-101). Nor is there any in the long Finding about the 5-hour meeting of October 1, 1942, attended by representatives of the Government and the gold mining industry, which was called to tell the owners of the gold mines about the proposal to close down the mines (Finding 36, R. 97-98).

The only references to equipment in the other Findings have no significance in determining the purpose of Order L-208 (R. 88, last par.; R. 92, lines 7-9).

[8] Respondents' brief, p. 60-62.

essential industries which had taken place in the eight months following the issuance of the Order, that evidence does not afford any support for the proposition that L-208 was issued for the purpose of releasing mining equipment or in the expectation that it would do so (see Appendix C hereto). It is not referred to in this Court's opinion.

IV.

We do not interpret this Court's opinion as holding that it was a purpose of L-208 to conserve *critical materials*. The Court's opinion repeatedly refers explicitly to *mining equipment*, as distinguished from critical materials. The distinction is important and it was clearly made by the parties.

In any event, the record would not support a finding that L-208 had a critical materials purpose, although the preamble to the Order stated that it did.

The Commissioner of the Court of Claims, that Court's hearing officer, included the following statement in a finding (R. 7-8):

> "Another consideration in the issuance of the order was as stated in the preamble that the fulfillment of requirements for the defense of the United States had created a shortage in the supply of *critical materials* which had been used in the maintenance and operation of gold mines."

The Court of Claims struck this statement from its Finding (R. 105-106), thus rejecting the Commisisoner's view that one of the purposes of L-208 was to conserve critical materials.

Critical materials, such as "mercury, molybdenum, tungsten, vanadium, chromium, manganese, etc." and "mercury, drill steel, etc." (R. 92), are to be distinguished from *mining equipment (including machinery)*. The distinction was explicitly made in the Government's brief on the merits, which asserted, in the statement of the question

presented, that L-208 was issued "to conserve *scarce war materials,* to divert *mining machinery and equipment* to essential wartime enterprises, and to bring about the voluntary relocation of manpower to vital mining activities and essential war work" (p. 2). The respondents agreed with the Government that the words "critical materials" or "materials", as used by the WPB, did not include "mining machinery and equipment".[9]

This Court's opinion indicates that the Court distinguished advisedly between critical materials and mining equipment. In the discussion of the merits the opinion refers specifically to *mining equipment* ("equipment", "mining equipment", "scarce equipment", or "scarce mining equipment") no less than 12 times (p. 165).[10] The opinion nowhere states that L-208 was issued in order to conserve *critical materials.*

The Finding of the Court of Claims that L-208 was not issued for the purpose of conserving critical materials is overwhelmingly supported by the record.[11]

V.

The procedure prescribed by the Congress for cases under the Tucker Act calls for the resolution of issues of fact by the Court of Claims and authorizes only a limited review of judgments of the Court of Claims by this Court, which is bound unless (1) "there is a lack of substantial evidence to sustain a finding of fact", (2) "an ultimate finding or findings are not sustained by the findings of

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[9] Respondents' brief, p. 60-62 and Appendix A thereto, p. 1-2.

[10] On the other hand, in the discussion of the merits in the opinion the only mention of *materials,* as distinguished from *equipment,* are (1) a brief summary of the contention of the respondents with respect to the preamble to L-208 (p. 166), and (2) a statement that: "It was lawful for the WPB to consider the impact of its material orders on the manpower situation" (p. 167).

[11] See respondents' brief, p. 11-18, 30-37, 97-101 and Appendix A thereto, p. 2-39, 45-54.

evidentiary or primary facts" or (3) "there is a failure to make a finding of fact on a material issue". *United States* v. *Penn Foundry & Manufacturing Co., Inc.* (1949) 337 U. S. 198, 207-208.[12]

In this case the prescribed procedure was followed in the Court of Claims, which gave the most painstaking consideration to the issues of fact, including the dominant issue as to the purpose of L-208. The majority of the Court of Claims joined in finding that the sole purpose of L-208 was to throw the gold miners out of work in the hope that they would go to essential mines. The ultimate Finding to that effect (Finding 46, R. 105-106)[13] was preceded by 28 Findings of evidentiary or primary facts (R. 75-105), which afford overwhelming support for the ultimate Finding. While Judge LARAMORE dissented from the judgment of the Court of Claims on the ground that L-208 was unauthorized, he did not indicate any disagreement with the majority as to the purpose of the Order (R. 61). And while the opinion of Chief Judge JONES, also dissenting, contains references to "critical materials" and "strategic materials", it does not contain anything remotely similar to what is said in this Court's opinion about mining machinery (R. 58-61).

It would seem that during the prolonged and exacting litigation in the Court of Claims both the litigants and that Court were entitled to assume that this Court would respect the rules enunciated, as recently as in 1949, in *Penn Foundry & Manufacturing Co., Inc.*

In effect, however, the Government sought and has obtained a trial on the facts *de novo* in this Court, in which the Government was not limited to the record or arguments made below.

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[12] This Court's discussion in Note 4 to the opinion in *Penn Foundry & Manufacturing Co. Inc.*, 337 U. S. at p. 207-208, was quoted in full in the respondents' brief herein at p. 63-64.

[13] See Note 2 above.

This Court's opinion does not even acknowledge that the Court of Claims made an explicit Finding on the all-important question as to the purpose of the Order.[14]

This Court has reached a conclusion, as to the purpose of L-208, for which there is no support in the record. As contrasted with the 28 Findings made by the Court of Claims as to evidentiary or primary facts, this Court's opinion does not cite a single evidentiary or primary fact to support its conclusion that "the WPB expected that L-208 would release substantial amounts of scarce mining equipment for use in essential industries" (p. 166). Assertions in the Government's brief take the place of the Findings of the Court of Claims, the Court to which the Congress committed the primary responsibility to determine the facts.

The Government may contend that even if this Court had considered itself bound by the Finding of the Court of Claims as to the purpose for which Order L-208 was issued, a majority of the Court might not have agreed with Mr. Justice HARLAN on the points of law discussed in his dissenting opinion (p. 179-184). Such a contention should not avail to prevent a rehearing. For the respondents are entitled to have the issues of fact first correctly disposed of. The Court's opinion states (p. 168):

> "Traditionally, we have treated the issue as to whether a particular Governmental restriction amounted to a constitutional taking as being a question properly turning upon the particular circumstances of each case."

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[14] This Court's opinion states (p. 167):

> "The record shows that *a* dominating consideration in the issuance of L-208 was the expectation that it would release experienced miners for work in the nonferrous mines, but the record does not support a finding that such was the sole purpose of the order." (Italics in original.)

Otherwise there is no reference in the opinion, direct or indirect, to any Finding of the Court of Claims.

It does not appear that a majority of the Court considered whether, if this Court did not disturb the Findings of Fact of the Court of Claims, it should affirm that Court's judgment that there was a constitutional taking.

VI.

The basis for this Court's reversal of the judgment of the Court of Claims was stated in the last paragraph of its opinion (p. 169):

> "The WPB here sought, by reasonable regulation, to conserve the limited supply of equipment used by the mines and it hoped that its order would divert available miners to more essential work. Both purposes were proper objectives; both matters were subject to regulation to the extent of the order."

As we have shown, the Court's holding that "The WPB here sought * * * to conserve the limited supply of equipment used by the mines" is in direct and irreconcilable conflict with the Finding of the Court of Claims, is not supported by any evidence, documentary or oral, and is incorrect in fact.

The implication that the diversion of "available miners to more essential work" was "subject to regulation to the extent of the order" was presumably intended merely to carry out the thought, previously stated in the opinion (p. 167), that when issuing a lawful regulatory order the WPB could properly "consider the impact" of the Order "on the manpower situation". The WPB had no regulatory authority to divert labor. That was acknowledged by the Chairman of the WPB at the time (Finding 24, R. 81). Since there was no lawful authority to regulate mine labor, the closing of the gold mines cannot be regarded as incidental to the Government's lawful regulation of such labor.

It follows that the closing of the gold mines was not incidental to a regulation, whether of mining equipment or of mine labor, but was a "taking" effected in order to maneuver manpower.

CONCLUSION.

Your petitioners pray that a rehearing be granted and that, upon such rehearing, the judgment of the Court of Claims be affirmed.

Dated, August 22, 1958.

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Certificate of Counsel.

I hereby certify that the foregoing petition for a rehearing is presented in good faith and not for delay.

Dated, August 22, 1958.

Edward W. Bourne,
Counsel for Respondents.

APPENDIX A

Statements quoted in the Findings of the Court of Claims which confirm the "manpower" purpose of Order L-208.

The following statements are taken from the Findings of the Court of Claims, being excerpts from documents quoted therein:

1) Report of War Department Committee, submitted July 8, 1942 (Finding 19, R. 76):

"Production of gold, with the exception of required amounts of essential silicious gold ores, should be curtailed by an order of the War Production Board to free labor which is urgently needed in the nonferrous mines which are essential to the war effort."

2) Memorandum of Acting Chief of Priorities Branch of the Labor Production Division, WPB, to Director of Operations, War Manpower Commission, sent July 4, 1942 (Finding 20, R. 77):

"Steps should be taken to remedy the critical labor situation in nonferrous metal mining, including arrangements for the transfer of miners from gold and silver mining to copper, lead, zinc, tungsten, chrome, and molybdenum mining. This can be done through curtailment of gold and silver production, * * *."

3) Memorandum of the General Counsel of War Manpower Commission to a member of his staff, sent July 9, 1942 (Finding 21, R. 78):

"General McSherry [Director of Operations of WMC] wishes to secure the release of men employed in the gold mining industry for transfer to the copper mining industry. Concededly the War Manpower Commission cannot accomplish this result directly. May the result be accomplished (1) by the War Production Board refusing to the gold mine operators critical materials used in their operations thus compelling the closing of the mines; * * *."

4) Minutes of the WPB of September 1, 1942 (Finding 25, R. 83):

"As further steps in halting out-migration, • • • an order has been prepared to prohibit the use of materials in nonessential gold mines, which may free about 8,000 workers; • • •."

5) Memorandum of Chief of Miscellaneous Minerals Branch, WPB, to Deputy Director General for Industry Operations, WPB, sent September 9, 1942 (Finding 27, R. 85):

"It was understood that the purpose of the order was to make mining labor now producing gold available to copper and other strategic nonferrous metal mines. This end can be attained by WPB only through its authority to control materials."

6) Minutes of the WPB Interdepartmental Committee on Non-Ferrous Metals for September 15, 1942 (Finding 30, R. 93-94):

"In this connection, since the primary purpose of the order was to free manpower rather than to curtail materials, Mr. Lipkowitz suggested that an advisory committee be established with representatives from Labor Production Division and War Manpower Commission."

7) Memorandum from Special Assistant to Chairman of the WPB to Chairman of the WPB, September 15, 1942 (Finding 31, R. 95):

"Actually, only a small amount of critical materials is used in gold mining. Hence, if it is contemplated to issue the order in its present form, the preamble should give the real reason; which is to divert this labor to more necessary industries."

8) Memorandum of Vice Chairman of the WPB to Deputy Director General for Industry Operations, WPB, sent September 15, 1942 (Finding 34, R. 96-97):

"It seems to me imperative that we very carefully word our press release so that the predominant objective, namely of releasing less essential labor for more essential requirements, shall be clearly evident."

9) Letter of Under Secretary of War to Vice Chairman of the WPB, sent October 2, 1942 (Finding 39, R. 99):

"I hope that prompt and effective action will be taken with regard to gold mining. I need not call your attention to the urgent need for more miners in the production of copper and other nonferrous metals as you know the situation as well as I do. The longer the delay in shutting down gold mining, the further off will be the relief of the copper shortage."

10) Memorandum of Under Secretary of War and Under Secretary of Navy to Chairman of the WPB, sent October 5, 1942 (Finding 40, R. 100):

"There are two thousand to three thousand hard-rock miners engaged in gold mining, now of no use in war production. These men could help out substantially in relieving the labor shortage in copper mining. They will not help out in copper mining so long as gold mining is carried on."

APPENDIX B

Priorities Regulation 13 and the two amendments of Order L-208.

The Government's contention that it was a purpose of L-208 "to divert mining machinery and equipment to essential wartime enterprises"[1] was not advanced in the Court of Claims or in the petition for certiorari, but was made for the first time in the Government's brief on the merits.[2]

In support of that contention the Government relied primarily on Priorities Regulation 13 and two amendments of Order L-208 which were adopted by the WPB on November 19, 1942 and August 31, 1943, respectively.

Priorities Regulation 13.

Priorities Regulation 13, which was issued by the WPB on July 7, 1942, 7 Fed. Reg. 5167, is not in the record.

The petitioner implied in its brief on the merits that Priorities Regulation 13 restricted sales of "material and equipment idled by L-208", but the respondents showed in Appendix A to their brief that that interpretation of the Regulation was erroneous (p. 60-62).

The Regulation is not mentioned in this Court's opinion and we assume that the Court did not accept the Government's contention relating to it.

The amendments of Order L-208 adopted on November 19, 1942 and August 31, 1943.

In its brief on the merits the Government also relied on the amendments of L-208 adopted on November 19, 1942 and August 31, 1943, which were intended to control any sales of mining equipment (including machinery) that the owners of the closed gold mines might wish to sell.

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[1] Petitioner's brief, p. 2.

[2] Respondents' brief, p. 60-62.

While a memorandum summarizing the amendment of November 19, 1942 was introduced in the record below, the amendment was never mentioned in anything submitted to the hearing officer or to the Court below and was not referred to on the oral argument.[3]

The amendment of August 31, 1943 is not in the record and was not referred to in any way below before the Commissioner or the Court of Claims, either in writing or orally.

In the statement of the case in this Court's opinion, the two amendments were summarized briefly and the amendment of November 19, 1942 was quoted (p. 160-161). In the subsequent discussion, the Court said (p. 167):

> "In any event, L-208 was soon amended to prohibit sale to nonessential users."

The Court did not indicate to what extent, if at all, it relied upon the amendments of L-208 as a support for the statements in the Court's opinion that when issuing L-208 "the WPB expected that L-208 would release substantial amounts of scarce mining equipment for use in essential industries" (p. 166), that "The WPB could properly rely on the profit motive to induce the mine owners to liquidate their inventories, and it was thought that the people who would be interested in purchasing used mining equipment probably would be the owners of essential mines" (p. 167), and that the WPB decided "that the unrestricted use of mining equipment and manpower in gold mines was so wasteful of wartime resources that it must be temporarily suspended" (p. 168).

The reason for the issuance of the amendment of November 19, 1942 is to be found in the WPB memorandum accompanying the amendment (Defendant's Exhibit 3, R.

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[3] Respondents' brief, Appendix A, p. 62-63.

478-479, 1574C, 1574D, 1575), which is the only evidence in the record relating to the amendment.

The memorandum accompanying the amendment did not say that the WPB expected that Order L-208 would release substantial amounts of scarce mining equipment. Nor did it say that the unrestricted use of such equipment in gold mines was wasteful of wartime resources. Nor did it say that the profit motive could be relied upon to induce the mine owners to liquidate their inventories. So far as is here pertinent the memorandum said only (R. 1575):

> "Operators of closed gold mines *may wish to sell* critical mining machinery or equipment. This should be controlled so that it will go to more essential rather than less essential mines."[4]

The quoted memorandum treated the closing of the mines as an accomplished fact and undertook only to deal routinely with a consequence of that fact. It contained no recommendation that the gold mine owners be compelled to transfer their equipment and no suggestion that the equipment was badly needed elsewhere. The memorandum and the amendment of November 19 related only to ma-

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[4] The full text of the pertinent paragraph in Defendant's Exhibit 3 (R. 1575) is as follows:

> "2. A provision freezing the machinery in nonessential mines. Operators of closed gold mines may wish to sell critical mining machinery or equipment. This should be controlled so that it will go to more essential rather than less essential mines. The proposed new paragraph freezes such machinery and equipment, but does not tie up small and standard operating supply items. Provision is made to have operators report promptly to the Mining Branch a description of all frozen machinery and equipment. The Mining Branch is setting up a unit to help in the speedy disposal of such machinery and equipment as the operator may wish to sell. The complete list will be available in case it becomes essential at a later date to requisition the other machinery and equipment."

chinery and equipment which the mine owners *might wish to sell.*

As we said in Appendix A to the respondents' brief on the merits in this Court (p. 65):

> "The amendment of November 19 could not change the character of what was done on October 8. If there were a convincing showing that on October 8 the WPB issued Order L-208 with the intention of channelling machinery and equipment into the nonferrous metals mines and inadvertently omitted the provision which was added on November 19, a different case might be presented. But that is not what happened.
>
> "If there was a taking on October 8 through the issuance of Order L-208 for the purpose of maneuvering gold mine labor to the nonferrous metal mines, it certainly did not end on November 19 because of the issuance of the amendment, which merely undertook to deal routinely with one of the incidental consequences of the taking."

The Government did not attempt to explain the occasion for or effect of the amendment of August 31, 1943. This Court has interpreted it as permitting the "disposition of equipment, without approval of the WPB, to persons holding certain preference ratings" (Opinion, p. 161). If, as seems to us indisputable, the amendment of November 19, 1942 does not tend to establish that it was a purpose of Order L-208, as issued, to conserve mining equipment, the further amendment of the Order on August 31, 1943 certainly has no such tendency.

APPENDIX C

The WPB meeting of June 15, 1943.

The earliest minute of a WPB meeting containing any reference to the diversion of mining equipment to essential industries is that of the meeting of June 15, 1943, at which the WPB decided not to rescind L-208 (Defendant's Exhibit 51, R. 965-966, 1605-1607).

The petitioner's brief contained a long quotation from the minute (p. 104-107) and it was discussed in the respondents' brief (Appendix A, p. 65-68).

The minute was offered as an Exhibit by the Government "to show the action taken by the Board and the discussion within the Board pertaining to the possible revocation of the order" (R. 966). Emphasizing the limitation on the offer, counsel for the Government said "That is the only purpose of the offer" (*id.*).

With respect to mining equipment, the minute set forth that (R. 1606):

> "By closing the nonessential gold mines a great deal of equipment was made idle and became available for essential activities. It is estimated that by the middle of May 1943, 2,200,000 dollars of used gold mining equipment had been transferred to essential activities and transfers are continuing at the rate of about 100,000 dollars per week."

The estimate that $2,200,000 of used gold mining equipment had been transferred to essential activities over a period of seven months can hardly have been very impressive. In any event, the recital of that estimate on June 15, 1943, eight months after the issuance of the Order, in a minute which related to a possible revocation of the Order and was offered in evidence only in that connection, does not afford any support for any of the statements in this Court's opinion that the WPB issued L-208 on October 8, 1942 because it expected that the Order would release

substantial amounts of scarce mining equipment for use in essential industries.

In the Court below there was no issue as to the reason why the WPB did not revoke the Order after it had once been issued. The Commissioner in the Court of Claims made no finding on that subject; the Government's 24 pages of Exceptions to the Commissioner's report (p. 350-373) contained no reference to the decision of the WPB on June 15, 1943 not to revoke the Order; and the Court of Claims made no Finding.

The WPB meeting of June 15, 1943 was not mentioned in this Court's opinion. Consequently, we assume that the minute of that meeting was not relied upon as supporting any of the statements in the Court's opinion as to the purpose of L-208. However, we have thought it suitable to refer to the minute in this petition for rehearing because of the emphasis in the petitioner's brief on the meeting of June 15, 1943 (p. 104-107) and the reference in the minute, quoted above, to mining equipment.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. ~~928~~ 50 758

F. STRAUSS & SON, INC., OF ARKANSAS
Petitioner

vs.

COMMISSIONER OF INTERNAL REVENUE
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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AUTHORITIES

IN THE

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Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

F. Strauss & Son, Inc., of Arkansas, your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above styled case on January 24, 1958.

OPINIONS BELOW

The opinion of The Tax Court of the United States, (Appendix A, pp. a-1 through a-7, *infra*) was reported at 28 T.C. 65. The opinion of the Court of Appeals, (Appendix B, pp. a-8 through a-15, *infra*) is reported at 251 Fed. (2d) 724.

JURISDICTION

The judgment of the Court of Appeals (Appendix C, p. a-16, *infra*) was entered on January 24, 1958. A timely Petition for Rehearing was denied on the 3rd day of March, 1958, (Appendix D, pp. a-17). The jurisdiction of this Court is invoked under 28 U.S.C.A., paragraph 1254(1), and Sec. 7482, Internal Revenue Code of 1954.

QUESTIONS PRESENTED

1. Whether payments by a corporate taxpayer to an organization established and utilized for the purpose of carrying on a publicity program designed to defeat an initiative measure submitted to the voters at large, which measure, if passed, would have destroyed the taxpayer's business, are deductible as ordinary and necessary business expenses under Section 23(a)(1)(A), I.R.C. of 1939.

2. Whether a regulation forbidding deduction of expenditures for "... the promotion or defeat of legislation, the exploitation of propaganda" may properly be construed to bar deduction as a business expense of expenditures made to defeat an initiative measure submitted to the people at large, passage of which would have destroyed the business involved, and, if so construed, whether same is valid.

STATUTE, REGULATION, AND STATE CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The statute, (Section 23(a)(1)(A), I.R.C. of 1939), and regulation (Section 29.23 (q)-1, Regulation 111), directly involved are set forth in Appendix E, pp. a-18 through a-19, *infra*. The state constitutional and statutory provisions incidentally involved are statutory provisions authorizing sale of liquor (Sections 48-305, 48-306 and 48-308, Ark.

Stats., 1947, Ann.) (Appendix E, pp. a-19—a-20); provisions relating to local option (Ark. Stats. 48-801 and 48-807) (Appendix E, pp. a-20—a-22); constitutional provisions relating to Initiative and Referendum (Appendix E, pp. a-22—a-24); and statutory provisions relating to non-profit corporations (Ark. Stats. 64-1301, 64-1302, 64-1306) (Appendix E, pp. a-24—a-25).

STATEMENT

Petitioner, an Arkansas corporation, had duly and timely filed a petition in the Tax Court of the United States requesting a redetermination of an asserted deficiency in income tax in the amount of $20,990.36 for the calendar year 1950.

There were two issues originally involved; first, the disallowance of a deduction based on a payment in 1950 by petitioner in the amount of $9,252.67 to Arkansas Legal Control Associates, Inc., either as a business expense on Sec. 23 (a)(1)(A) or as a contribution under Sec. 23(q), and secondly, whether petitioner was liable to the surtax imposed by Section 102 of the Internal Revenue Code of 1939 (Petition, R.3-4), The Section 102 issue was settled, leaving only the issue of disallowance of the claimed deduction, by stipulation that if Petitioner should prevail with respect to the issue still in controversy the Court should determine a deficiency of $6,500.00, and if the Respondent should prevail the court should determine a deficiency of $10,386.12 (Paragraph 10 of Stipulation, R. 17-18).

Most of the facts were stipulated (R.10-25) and were made a part of the findings of the Tax Court (R.27).

In 1950 Petitioner, an Arkansas corporation, was engaged in the wholesale liquor business (R.25; Findings, R.27, R.25). Subject to provisions for county-wide local

option (Sec. 48-801 and Sec. 48-807, Ark. Stats. Ann. of 1947) (Appendix E, pp. a-20—a-22), the sale of intoxicating liquor had been legal in Arkansas since 1935 (Findings, R.27). Pertinent provisions legalizing sale are found in Appendix E, pp. a-19—a-20.)

An initiated petition calling for an election on statewide prohibition was placed on the ballot and voted on in the General Election held in the State of Arkansas on November 7, 1950. The general purpose of the act, as the ballot title implied, was to make it unlawful to manufacture, sell, barter, loan or give away intoxicating liquors within the State of Arkansas, or to export from, import to, or transport the same within the State of Arkansas (Par. 4 of Stipulation, R.12) (Findings, R.27).

In May of 1950, nine liquor wholesalers, including petitioner, formed the Arkansas Legal Control Associates, Inc., as a non-profit organization pursuant to the provisions of state law (Findings, R.27) (R.12,25). The sole purpose of the wholesalers in forming this organization was to provide means of coordinating their efforts to persuade the general public, by advertising, to vote against the proposed prohibition act (Findings, R.27) (R. 25).

Between May and November, 1950, contributions totaling over $126,000.00 were received by Arkansas Legal Control Associates, Inc., and during that period it paid out over $100,000.00 for direct advertising through newspapers, radio, billboards and other media (Stip. R.13, 14, Ex. 5-E at R.19) (Findings, R.30). Such advertising contained reasons and statistics designed to convince the voters to defeat the act (Par. 7 of Stipulation, R.14,15,16, Exhibits 7-G and 11-K at R.21,22) (Findings, R.30). The Statewide Prohibition Act was in fact defeated (Par. 4 of Stip., R.13) (Findings, R.30).

cover of a regulation which, as here applied, is at variance with the governing statute.

These are important questions which should be settled by this Court. In answering these questions the court below, we submit, misapplied and misconstrued *McDonald* v. *Comm.*, 323 U.S. 57, and *Textile Mills* v. *Comm.*, 314 U.S. 326, particularly in the light of *Comm.* v. *Heininger*, 320 U.S. 467, and *Lilly* v. *Comm.*, 433 U.S. 90, and the recently decided cases of *Truck Tank Rentals, Inc.* v. *Comm.*, Oct. term 1957, No. 109, and *Comm.* v. *Neil Sullivan, et al*, No. 119, Oct. term, 1957, both decided by this Court Mar. 17, 1958, and appearing respectively at Vol. 2, Law Ed. (2d), pages 562 and 559.

These questions are basically the identical questions involved in *Cammarano* v. *United States*, (No. 718) (October term, 1957) now pending in this Court as a result of granting a Petition for Writ of Certiorari in that case (Vol. 2, L. Ed. 2d, p. 529, Mar. 17, 1958). That case involves the disallowance as a business expense of contributions by wholesale beer dealers to a fund established to defeat an initiative petition, which, if passed, would have placed retail beer exclusively in state owned stores: i.e., would have put wholesalers out of business. This case involves contributions to an organization formed to defeat an initiative measure, which, if passed, would have put liquor wholesalers out of business. In view of this, further argument amplifying the reasons relied on for granting the writ is here abbreviated:

I

These questions are important, and will continue to arise. Sec. 162(a) of the Internal Revenue Code of 1954* is the same as Sec. 23(a)(1)(A) of the 1939 Code.

* Sec. 162(a) provides in part:
"§ 162. Trade or business expense.
(a) In general—There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on a trade or business. . . ."

The case was duly submitted on the pleadings, the Stipulation and Exhibits thereto, and oral testimony. The court determined that the contribution made by petitioner in 1950 to the Arkansas Legal Control Associates, Inc., was neither deductible as a business expense under Sec. 23(a)(1)(A) of the Internal Revenue Code of 1939, or as a contribution under Sec. 23(q) of the Internal Revenue Code of 1939 (R.26-32).

The court held for respondent primarily upon the ground that the regulation involved (Sec. 29.23 (q)-1, Regulations 111) was applicable and valid (Appendix A, pp. a-6—a-7).

From this decision the petitioner duly prosecuted a Petition for Review (R.32-36). In its brief before the Court of Appeals, petitioner abandoned any contention under Sec. 23(q), so that the only question for consideration by the Court of Appeals (and the only one considered, Appendix B, p. a-10) was the deductibility of the payment as a business expense under Sec. 23(a)(1)(A). The court below held (Appendix B, pp. a-11—a-15) that the regulation involved was applicable and valid, and further rested its decision on the ground that, quite apart from the regulation, the expenses were not ordinary and necessary (Appendix B, p. a-13).

A timely petition for rehearing was denied (Appendix D, p. a-17).

REASONS FOR GRANTING THE WRIT

The basic questions presented are whether legitimate expenditures made by a corporate taxpayer to convince voters to defeat an initiative measure, which, if passed, would have destroyed taxpayer's business, are, apart from regulations, ordinary and necessary business expenses, and, secondly, whether, if such expenses are otherwise ordinary and necessary, they can be disallowed under

The expenses here involved are clearly legal and legitimate, and were in the judgment of the taxpayer** absolutely necessary to prevent destruction. The case presents sharply the important questions of whether, first, legitimate expenses calculated to achieve an obviously desirable business result (i.e., non-destruction) do not possess all elements normally required for deductibility, any intimations of *McDonald* to the contrary notwithstanding, and, secondly, whether, if they do possess all elements usually required for deductibility, such expenses can be otherwise validly disallowed, merely because of a regulation directed to another type of activity.

II

The court below, we submit, misapplied *McDonald* v. *Comm.*, 323 U. S. 57. Although resting its opinion primarily on the regulation, the court held that the expenses were not allowable in any event. Logically, this is the first facet of the case to be discussed, for, if the expenses are not allowable irrespective of the regulation, obviously we need not discuss the question of the applicability or the validity of the regulation.

The court below relied in this connection (Appendix B, pp. a-12—a-13) upon *McDonald* v. *Comm., supra.* That case we submit, is not applicable. Not only was that case bottomed (p.64) upon the now abrogated* rule of the Dobson case (*Dobson* v. *Comm.*, 320 U. S. 489) and to some extent, upon public policy (p.64) but that case primarily involved an attempt to convince voters to permit the taxpayer to engage in business in the future. We have here the expenses incurred to save an existing business from de-

*Sec. 1141 (a) of the 1939 Code, as amended by Sec. 36 of Pub. Law 773, 80th Congress, 2nd Session, effective Sept. 1, 1948, and its 1954 counterpart, Sec. 7482, both provide that Tax Court decisions are reviewable " . . . . . in the same manner and extent as decisions in the district courts in civil actions tried without a jury."

**Cf. Welch v. Helvering, 290 U. S. 112, 113.

struction. This Court has allowed expenses of resisting a fraud order condemning a dentist's business; *Comm. v. Heininger*, 314 U. S. 326.** This principle was again accepted in *Lilly* v. *Comm.*, 343 U. S. 90, 94, in Note 4, where this Court noted with approval the statement in the Court of Appeals in the Heininger case (133 Fed. (2d) 567, 570) that . . . "Without this expense there would be no business. . . . To say that this expense is not ordinary and necessary is to say that that which gives life is not ordinary and necessary." See also *Lucas* v. *Wofford*, 49 Fed. (2d) 1027, allowing the expense of forestalling adverse legislation; also, *Los Angeles and Salt Lake Railroad Company*, 18 B.T.A. 168 (1929), allowing expenses of advertising in order to create favorable public opinion to forestall unfavorable legislation.

III

Primarily, the court below rested its decision on the regulation, in turn, relying on Textile Mills, *supra*, and the so-called re-enactment rule.

A. The opinion of the court below that Textile Mills sustained the regulation involved *without qualification* (Appendix B, p. a-14) seems completely unwarranted. Textile Mills involved expenses paid pursuant to a contract for procuring legislation. The lower court in *Textile Mills*, 117 Fed. (2) 62, pointed out that those contracts had been specifically held invalid in *Gesellschaft Fur Drahtlose Telegraphie M. B. H.* v. *Brown*, App. D. C. 357, 78 Fed. (2d) 410, and *Brown* v. *Gesellschaft Fur Drahtlose Telegraphie M. B. H.*, 70 App. D. C. 94, 104 Fed. (2d) 227, certiorari denied 307 U. S. 640, 59 S. Ct. 1038, 83 L. Ed. 1521. This Court recognized that the contracts were at least of dubious validity, and therefore, this Court would not say

**And if expenses of trying to convince a court that taxpaper should be permitted to stay in business are allowable, why not expenses of trying to convince the voters?

that in applying the Regulation to such a situation "the line was too strictly drawn", (p.339). That is a far cry from upholding the Regulation if and as applied to the instant situation, where no frown of public policy is present. In view of *Comm.* v. *Heininger*, 314 U.S. 326, and *Lilly* v. *Commissioner*, 343 U. S. 467, restricting denial of expenses otherwise allowable to those that frustrate sharply defined national and state policies, it is apparent that Textile Mills would not govern here. And *Tank Truck Rentals, Inc.* v. *Comm.* and *Comm.* v. *Sullivan*, both *supra*, decided by this Court on Mar. 17, have made even clearer that Texile Mills upheld the Regulation only as applied to situations of doubtful legality or morality.

B. The re-enactment rule relied on by the court below (Appendix B, pp. a-13—a-14) is neither persuasive nor applicable. First, there has never been any case authoritatively construing and upholding the regulation until Textile Mills was decided in 1941. There has been no real re-enactment since that time, the last re-enactment prior to the 1954 Code being in 1939. There being no re-enactment, the rule simply does not apply; *Helvering* v. *Hallock*, 309 U. S. 106, Footnote 7.

Further, if the re-enactment rule had any applicability it would tend to sustain petitioner's position, rather than defeat it. Between the time the first regulation was adopted in 1917 and the year 1939, there were over 12 substantial re-enactments. During this period there were many decisions generally allowing expenses connected with the promotion or defeat of legislation provided they were legitimate expenses and were otherwise ordinary and necessary. *Lucas* v. *Wofford*, *supra*, (1931) (expenses incurred to forestall adverse legislation); Los Angeles and Salt Lake Railway Company, *supra* (1929), advertising to avoid unfavorable legislation on return of the

railroads to private ownership after the War). The lower court, in Textile Mills itself, 38 B.T.A. 623 (1938) refused to be guided by *Sunset Scavenger Company, Inv.* v. *Commissioner*, 84 Fed. (2) 483, the primary contrary authority at the time, but referred approvingly to *Lucas* v. *Wofford*, *supra*, and held for the taxpayer.

At the best, there was no settled judicial construction of the regulation prior to 1939. The interpretation not being settled, there is no reason to apply the rule; *Merten's Law of Federal Income Taxation*, 1954, 32.3. And as pointed out, Textile Mills never applied the Regulation to the instant situation in any event.

> "... We walk on quicksand when we try to find in the absence of corrective legislation a controlling legal principle." *Helvering* v. *Hallock*, *supra*.

IV

As pointed out, the issues here are identical with those presented in *Cammarano* v. *U. S.*, Certiorari granted, 2 Law Ed. (2nd) 529. Both cases involve expenditures to defeat initiated measures which, if passed, would have destroyed the taxpayer's business. Although that case involved an individual and this case involves a corporate taxpayer, the portions of the Regulations applying to each type of taxpayer is the same.*

*The pertinent portion of Sec. 29.23(o)-1, Reg. 111, applying to individuals, provides: "Sums of money expended for lobbying purposes, the promotion or defeat of legislation, the exploitation of propaganda, including advertising other than trade advertising, and contributions for campaign expenses, are not deductible from gross income." Indentical language is contained in Sec. 29.23(q)-1, Appendix E, page a-18—a-19.

CONCLUSION

For the foregoing reasons it is respectfully submitted that a writ of certiorari be granted.

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APPENDIX A

(Findings of Fact and Opinion of The Tax Court of the United States.)
28 T. C. No. 65.

Tax Court Of The United States

F. Strauss & Son, Inc. Of Arkansas, Petitioner,

Docket No. 53669. vs.

Commissioner Of Internal Revenue, Respondent.

Filed May 31, 1957.

The petitioner, a wholesale liquor dealer, paid sums of money to a corporation organized by nine Arkansas liquor wholesalers for the purpose of persuading Arkansas voters by various advertising devices to vote against proposed Arkansas prohibition act.

Held: Such sums are not deductible either as business expenses under section 23(a)(1)(A), Internal Revenue Code of 1939, or as contributions under section 23(q), Internal Revenue Code of 1939.

E. Chas. Eichenbaum, Esq., for the petitioner.

John P. Higgins, Esq., for the respondent.

Bruce, Judge The respondent determined a deficiency in the income tax of petitioner for the calendar year 1950 in the amount of $20,990.36. Of the adjustments made by respondent the only one remaining in dispute is whether payment of $9,252.67 by petitioner to the Arkansas Legal Control Associates, Inc., in 1950 constituted an ordinary and necessary business expense of petitioner or, alternatively, whether such payment is deductible as a contribution within the meaning of section 23(q), Internal Revenue Code of 1939.

Findings Of Fact.

The stipulated facts, together with attached exhibits, are incorporated herein by this reference. Petitioner is a corporation organized under the laws of the State of Arkansas with its principal place of business in Little Rock, Arkansas. Petitioner kept its books and prepared its income and excess profits tax returns on an accrual basis of accounting. Its 1950 income and excess profits tax return was filed with the collector of internal revenue for the district of Arkansas. In the year 1950 petitioner was engaged in the wholesale liquor business.

Subject to provisions for countywide local option (secs. 48-801 and 48-807, Ark. Stat. Ann. of 1947), the sale of intoxicating liquor in Arkansas has been legal since 1935.

An initiative petition calling for an election on a statewide prohibition act was circulated in Arkansas, filed with the Office of the Secretary of State, placed on the ballot, and voted on in the general election held in Arkansas on November 7, 1950. The general purpose of the act was to make it unlawful to manufacture, sell, barter, loan, or give away intoxicating liquors within the State of Arkansas or to export from, import to or transport the same within the State of Arkansas.

In May of 1950 nine liquor wholesalers petitioned the Circuit Court of Pulaski County, State of Arkansas, to declare Arkansas Legal Control Associates, Inc. (hereinafter referred to as Control Associates) duly incorporated as a nonprofit corporation pursuant to the provisions of the state law. The Circuit Court of Pulaski County issued a certificate of incorporation to Control Associates on May 3, 1950. The stated objects and purposes of Control Associates provided, inter alia:

. . . . . .

Article II.

Objects And Purposes.

Section 1.

The objects and purposes for which this organization is formed and the powers and rights which it shall exercise and enjoy are: To foster and promote in every and any lawful manner the interests of persons, firms, associations, corporation and others engaged or interested directly or indirectly in the alcohol beverage industry, or in any branch thereof, or in any industry or business alike or incidental thereto.

Section 2.

In furtherance, but not in limitation, of the foregoing general purposes, it is expressly provided that the organization shall have the following powers:

• • • • • • •

b. To engage in educational and publicity campaigns and programs.

c. To support improved regulatory laws governing the sale and use of alcohol beverage, and to uphold the system of private enterprise in the manufacture, distribution and sale of alcohol beverage.

d. To provide honest opposition to the principles of prohibition, and its resulting evils.

e. To support related public relations programs.

• • • • • • •

Article V.

Uses.

The corporation shall not be used for business purposes or make any contribution or expenditure in connection with

any election at which Presidential or Vice Presidential electors or a Senator or Representative to Congress are to be voted for or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for the pecuniary gain or profit of its members, and no part of the net earnings of the corporation shall inure to the benefit of any member or private individual. The corporation may, however, support or oppose public laws or constitutional measures which its members and trustees deem against public interest and opposed to the purposes and objects of the corporation.

* * * * * * *

The purpose of the wholesalers in forming Control Associates was to provide means of coordination of their efforts in persuading the general public to vote against the proposed statewide prohibition act.

An application for exemption under section 101(7) of the Internal Revenue Code of 1939 was filed with the Commissioner of Internal Revenue on May 25, 1951, by Control Associates. This application for exemption was rejected by the Commissioner on October 11, 1951. The letter of rejection provided in part as follows:

* * * * * * *

Inasmuch as the evidence on file in this office shows that your sole function and activity consisted of engaging in activities designed to influence legislation, through the use of the radio, advertisements in newspapers and dissemination of literature, it is the opinion of this office that you are not entitled to exemption from Federal income tax as a business league under the provisions of section 101(7) of the Code, and that you are not an organization of the same general class as a chamber of commerce or board of trade within the meaning of Income Tax Regulations III, section

29.101(7)-1. You will accordingly be required to file Federal income tax returns on Form 1120.

Contributions made to you are not deductible by the donors in computing their taxable net income in the manner and to the extent provided by section 23(o) and (q) of the Code.

* * * * * * *

After the organization of Control Associates in 1950 petitioner paid the amount of $9,252.67 to that organization. Contributions totaling $126,265.84 were received by Control Associates for the period beginning May 30, 1950 and ending November 30, 1950. During that period over $100,000 was paid out by Control Associates for direct advertising through newspapers, radio, billboards, distribution of book matches, bar banners, special folders, and press releases. Such advertising contained reasons and statistics designed to convince the voters that it was to the public interest to defeat the act. The balance of the contributions were paid out for related expenses of supervising and coordinating such advertising. The statewide prohibition act was defeated. On its income tax return for 1950 the petitioner deducted the $9,252.67 in dispute from gross income as business expense. The respondent disallowed such deduction.

Opinion.

The principal issue in this case is whether amounts paid by petitioner, a wholesale liquor dealer, to a corporation organized by nine Arkansas liquor wholesalers for the purpose of persuading Arkansas voters by various advertising devices to vote against a proposed prohibition act, are deductible as ordinary and necessary business expenses within the meaning of section 23(a)(1)(A), Internal Revenue Code of 1939. It is clear that such payments are not deductible under section 23(q), Internal Revenue Code of

1939, and the petitioner does not seriously contend otherwise.

The question involved herein has been determined many times by this and other courts. In Textile Mills Securities Corporation vs. Commissioner, 314 U. S. 326, the Supreme Court determined that certain amounts expended to provide publicity and promote propaganda seeking to influence proposed legislation were not deductible as "ordinary and necessary" business expenses within the meaning of section 23(a) of the Revenue Act of 1928, the language of which is identical with the applicable language of section 23(a)(1)(A) of the Internal Revenue Code of 1939.

We have recently had occasion to determine the principles involved in the instant case in Herbert Davis, 26 T. C. 49. There the petitioner was one of three licensed liquor dealers in Clinton, Tennessee, all of whom were restricted to operating within a three-block area located approximately in the center of the Clinton business district. Petitioner made certain payments in 1950 for dues to an association of liquor dealers, the funds of which association were used in the main for propaganda purposes and for campaign expenses in conjunction with a 1950 liquor referendum, to influence voters to vote "wet". In that case we followed the rule of Textile Mills and held that the payments were not deductible as ordinary and necessary business expenses.

The law is well settled. In Textile Mills Securities Corporation vs. Commissioner, 314 U. S. 326 (1941), the Supreme Court, in a case involving donations made by a corporation, gave its approval to the substance of the regulations here involved when it sanctioned the then applicable provision of Regulation 74 containing precisely the same language presently included in Regulations 111, sections 29.23(o)-1 and 29.23(q)-1. The application of such princi-

ples to limit the deductibility of donations of individuals under section 23(o) by Regulations 111, section 29.23(o)-1, is equally valid. Textile Mills Securities Corporation, *supra;* Mary E. Bellingrath, 46 B.T.A. 89 (1942); Mrs. William P. Kyne, 35 B.T.A. 202 (1936).

[fol. 76] We have also held that the principles embodied in such regulations were applicable as well under section 23 (a). McClintock-Trunkey Co., 19 T. C. 297, 304 (Issue 2), reversed on another issue (C.A. 9, 1954) 217 F. 2d 329. See also American Hardware & Equipment Co. vs. Commissioner, (C.A. 4,1953) 202 F. 2d 126, affirming a Memorandum Opinion of this Court.

See also Wm. T. Stover Co., 27 T.C. 434, and Revere Racing Association, Inc. vs. Scanlon, 232 F. 2d 816.

Petitioner recognizes the contrary effect of these cases. It is argued, however, that the rule of the Textile Mills case has been substantially narrowed by subsequent decisions of the Supreme Court, citing Heininger vs. Commissioner, 320 U. S. 467, and Lilly vs. Commissioner, 343 U. S. 90. The Heininger case involved the deductibiliy of lawyers' fees and other legal expenses incurred by the taxpayer in unsuccessfully contesting a Post Office fraud order. Lilly involved the deductibiliy of an optical company's payments to eye doctors, which payments amounted to one-third of the retail price of eyeglasses which were prescribed to patients by such eye doctors. Neither involved the question of the deductibility of expenditures used for lobbying purposes and are therefore distinguishable and do not come within the precedent of the Textile Mills case. See Lilly vs. Commissioner, *supra,* at page 95. Accordingly, we hold that the payments in issue are not deductible by the petitioners as an ordinary and necessary business expense.

Decision will be entered that there is a deficiency in the amount of $10,386.12.

OPINION BELOW

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 15,864

F. Strauss & Son, Inc. of Arkansas,
Petitioner,
Commissioner of Internal Revenue,
Respondent.

Petition to Review Decision of The Tax Court of the United States.

[January 24, 1958.]

Leonard L. Scott and E. Charles Eichenbaum (W. S. Miller, Jr., was with them on the brief) for Petitioner.

David O. Walter, Attorney, Department of Justice (Charles K. Rice, Assistant Attorney General, Lee A. Jackson, Attorney, Department of Justice, and Grant W. Wiprud, Attorney, Department of Justice, were with him on the brief) for Respondent.

Before GARDNER, Chief Judge, and WOODROUGH and VOGEL, Circuit Judges.

GARDNER, Chief Judge.

This matter is before us on petition to review a decision of the Tax Court which determined a deficiency in peti-

tioner's income tax for the year 1950 in the amount of $10,386.12.

Taxpayer is a corporation which at all times here pertinent was engaged in the wholesale liquor business in Little Rock, Arkansas. The sale of liquor in Arkansas has been legal since 1935, subject to state laws providing for county-wide option. At a general election held in November, 1950, there was submitted to vote, pursuant to the Arkansas law, an initiated measure in the nature of a state-wide prohibition act which by its terms would have made it unlawful to manufacture, sell, barter, loan or give away intoxicating liquors within the State of Arkansas, or to export from, import to or transport the same within the state.

In this situation taxpayer and eight other wholesale liquor dealers organized a corporation known in the record as the Arkansas Legal Control Associates, Inc., which we shall hereinafter refer to as the corporation. The purpose of the wholesalers in forming the corporation was to persuade the electorate to vote against the proposed prohibition act, and for the period from May 30 to November 30, 1950, the corporation received contributions totaling $126,265.84 and disbursed over $100,000 for direct advertising through newspapers, radio, billboards, book matches, bar banners, special folders and press releases. Such advertising contained arguments designed to convince the voters that it was in the public interest to defeat the proposed prohibition act. Taxpayer's contribution to the corporation amounted to $9,252.67. On its income tax return for 1950 taxpayer deducted this amount from gross income as an ordinary and necessary business expense but the Commissioner disallowed this deduction.

In the Tax Court taxpayer contended that its payment to the corporation was deductible as a business expense,

or alternatively, as a contribution. The Tax Court determined that the payment made by taxpayer to the corporation was neither deductible as a contribution under Section 23(q) of the Internal Revenue Code of 1939 nor as a business expense under Section 23(a)(1)(A) of the Internal Revenue Code of 1939. Taxpayer has now abandoned its contention that this payment to the corporation was a contribution deductible under Section 23(q) of the Internal Revenue Code of 1939, but adheres to its contention that its payment to the corporation was an ordinary and necessary business expense under Section 23(a)(1)(A) of the Internal Revenue Code of 1939, and that is the sole question presented for our determination.

Section 23(a)(1)(A) reads in part as follows:

> "In computing net income there shall be allowed as deductions: * * * All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business * * *."

The statute does not define nor determine what is or is not an "ordinary and necessary" business expense. Deductions are a matter of legislative grace and do not turn on general equitable considerations and the burden of clearly showing the right to the claimed deduction is on the taxpayer. *Deputy* v. *DuPont*, 308 U. S. 488; *New Colonial Co.* v. *Helvering*, 292 U. S. 435; *Omaha Nat. Bank* v. *Commission of Internal Rev.*, 8 Cir., 183 F. 899; *O'Malley* v. *Yost*, 8 Cir., 186 F.2d 603; *Wetterau Grocer Co.* v. *Commissioner of Internal Rev.*, 8 Cir., 179 F.2d 158; *Montana Power Company* v. *United States*, 3 Cir., 232 F.2d 541. In *New Colonial Co.* v. *Helvering, supra*, the rule is stated as follows:

> "Whether and to what extent deductions shall be allowed depends upon legislative grace; and only as there is clear provision therefor can any particular deduction be allowed."

In *Omaha Nat. Bank* v. *Commissioner of Internal Rev.*, *supra*, in referring to the rule to be followed in determining income tax deductions we said:

> "In examining the taxpayer's argument we are required to be mindful of the rule that an income tax deduction is a matter of legislative grace and that the burden of clearly showing the right to the claimed deduction is on the taxpayer."

The statute allowing deductions for ordinary and necessary business expenses, as has been observed, does not define nor determine what is or is not an ordinary and necessary business expense. In this situation Section 29.23(q)-1, Treasury Regulation 111, was adopted definitely describing certain classes of expenditures as not allowable deductions under this statute. The regulation reads as follows:

> "* * * Sums of money expended for lobbying purposes, the promotion or defeat of legislation, the exploitation of propaganda, including advertising other than trade advertising, and contributions for campaign expenses are not deductible from gross income."

This regulation has been in effect for nearly forty years and is in the nature of a proclaimed policy. It was considered and sustained by the Supreme Court in *Textile Mills Corp.* v. *Comm'r.*, 314 U. S. 326. In that case the court disallowed as deductions expenditures for services rendered in an attempt to procure legislation authorizing payment of claims submitted by former enemy aliens. In the course of the opinion the court among other things said:

> "The words 'ordinary and necessary' are not so clear and unambiguous in their meaning and application as to leave no room for an interpretative regulation. The numerous cases which have come to this Court on that issue bear witness to that. *Welch* v.

Helvering, 290 U. S. 111; *Deputy* v. *duPont*, 308 U. S. 488, and cases cited. Nor has the administrative agency usurped the legislative function by carving out this special group of expenses and making them non-deductible. We fail to find any indication that such a course contravened any Congressional policy. Contracts to spread such insidious influences through legislative halls have long been condemned. *Trist* v. *Child*, 21 Wall. 441; *Hazelton* v. *Sheckells*, 202 U. S. 71. Whether the precise arrangement here in question would violate the rule of those cases is not material. The point is that the general policy indicated by those cases need not be disregarded by the rule-making authority in its segregation of non-deductible expenses. There is no reason why, in absence of clear Congressional action to the contrary, the rule-making authority cannot employ that general policy in drawing a line between legitimate business expenses and those arising from that family of contracts to which the law has given no sanction. The exclusion of the latter from 'ordinary and necessary' expenses certainly does no violence to the statutory language. The general policy being clear it is not for us to say that the line was too strictly drawn."

See also *McDonald* v. *Commissioner*, 323 U. S. 57; *Roberts Dairy Co.* v. *Commissioner of Internal Rev.*, 8 Cir., 195 F.2d 948; *Sunset Scavenger Co.* v. *Commissioner of Internal Rev.*, 9 Cir., 84 F2d 453; *Cammarano* v. *United States*, 9 Cir., 246 F.2d 751; *Revere Racing Association* v. *Scanlon*, 1 Cir., 232 F.2d 816; *American Hardware & Eq. Co.* v. *Commissioner of Internal Rev.*, 4 Cir. 202 F.2d 126.

Taxpayer is a corporation organized for the purpose of conducting a wholesale liquor business. It cannot, we think, be reasonably contended that expenditure in conducting a campaign for the defeat of a proposed prohibition enactment was an ordinary and necessary expense of "carrying on" a wholesale liquor business. The corporation was empowered by its charter to conduct a wholesale

liquor business and it was not empowered by its charter or articles of incorporation to conduct political campaigns. In *McDonald* v. *Commissioner, supra,* petitioner made very substantial expenditures in his campaign to be re-elected a judge and he sought to deduct these expenditures as ordinary and necessary business expenses. In denying the right to make these deductions, the court among other things said:

> "He could, that is, deduct all expenses that related to the discharge of his functions as a judge. But his campaign contributions were not expenses incurred in being a judge but in trying to be a judge for the next ten years."

In that case, as in the instant case, it was urged that the expenditure was necessary as his defeat in the election would ruin his business. Quite aside from the Treasury Regulation, we think it cannot be said that this statute, Section 23(a)(1)(A) of the Internal Revenue Code of 1939, is a clear provision for such allowance.

It is urged by taxpayer that the quoted regulation, if applicable, is invalid, and in this connection it is contended that as there has been no real re-enactment of the Internal Revenue Code since this regulation was approved by the Supreme Court in the *Textile Mills* case, *supra,* the question of its validity is still an open one and, hence, it is not entitled to the support of the principle that repeated Congressional re-enactment of the statutory provision to which a regulation pertains gives it the force and effect of law. The decision in the *Textile Mills* case was presumably well known to the Congress. The Congress has had many sessions since this decision was handed down and the regulation itself has been in effect for nearly forty years, and presumably that fact was also well known to the Congress. Neverthless, the Congress has passed no act rejecting the construction given this statute by this

regulation. *United States* v. *Armature Rewinding Co.*, 8 Cir., 124 F.2d 589; 47 C.J.S. Internal Revenue, Section 70, p. 201. In *United States* v. *Armature Rewinding Co., supra,* in referring to the fact that the Congress had passed no act rejecting the construction adopted by the Commissioner of Internal Revenue, we said:

> "It has, however, become increasingly apparent that the purpose of a taxing act, the probable intent of Congress, the general statutory scheme of taxation set up, and the construction adopted by the Commissioner of Internal Revenue and not rejected by Congress must all be given appropriate effect in determining what meaning is to be accorded a word or a phrase in such an act."

The applicable rule is succinctly stated in 47 C. J. S. Internal Revenue, *supra,* as follows:

> "A treasury department regulation construing and interpreting an internal revenue statute is deemed approved by congress where congress thereafter substantially reenacts the statute. *A similar inference of congressional approval of the regulation is made where a substantial period of time has elapsed since the promulgation of the regulation and congress has not acted with respect to the statute* • • •." (Italics supplied.)

Manifestly, under this regulation the deductions here claimed did not constitute ordinary and necessary business expenses.

Taxpayer contends that the doctrine of the *Textile Mills* case hase been modified by the decisions of the Supreme Court in *Commissioner* v. *Heininger,* 320 U. S. 467, and *Lilly* v. *Commissioner,* 343 U. S. 90. The argument is plausible but not convincing. The *Textile Mills* case sustained without qualification the regulatory provision in question as valid. In *Commissioner* v. *Heininger* and *Lilly*

v. *Commissioner*, both *supra*, the decisions were not based upon the Treasury Regulations but the question was whether certain expenditures were non-deductible because contrary to public policy. The court held they were not contrary to public policy and, hence, deductible. We think these decisions detracted nothing from the teaching of the decision in the *Textile Mills* case.

We have considered all the other contentions urged by taxpayer but think them without merit. The decision of the Tax Court is therefore affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX C

(Judgment)

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 15864 ..... September Term, 1957

Friday, January 24, 1958.

F. Strauss & Son, Inc., of Arkansas ..... *Petitioner*

v.

Commissioner of Internal Revenue ..... *Respondent*

Petition to Review Decision of the Tax Court of the United States

This cause came on to be heard on the petition to review the decision of the Tax Court of the United States entered June 4, 1957, which determined a deficiency in petitioner's income tax for the year 1950 in the amount of $10,386.12, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the decision of said the Tax Court of the United States, in this cause, be, and the same is hereby, affirmed.

And it is further Ordered by this Court that the said petition to review in this cause be, and the same is hereby, dismissed.

January 24, 1958.

APPENDIX D

(Order denying Petition for Rehearing.)

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 15864 ..... September Term, 1957.

Monday, March 3, 1958.

F. Strauss & Son, Inc. of Arkansas, Petitioner v. Commissioner of Internal Revenue, Respondent	Petition to Review Decision of The Tax Court of the United States

Petition for rehearing filed by the petitioner in this cause having been considered by this Court, It is now here Ordered that the same be, and it is hereby, denied.

March 3, 1958.

APPENDIX E

STATUTE, REGULATION, AND STATE CONSTITUTIONAL PROVISIONS INVOLVED

1. Section 23(a)(1)(A) of the Internal Revenue Code of 1939 provides in pertinent part as follows:

> "§ 23. **Deductions from gross income.** In computing net income there shall be allowed as deductions:
>
> "**(a) Expenses.**
>
> "**(1) Trade or Business Expenses.**
>
> "**(A) In General.** All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, * * *."

2. Section 29.23(q)-1, of Treasury Regulation 111, as it existed during 1950, provided as follows:

> "*Contributions or gifts by corporations.*—A corporation may deduct from its gross income contributions or gifts to organizations described in section 23(q) (see section 29.22(b) (4)-1 for definition of 'political subdivision'). Where payment is made in a taxable year beginning prior to the first taxable year beginning after the date of the cessation of hostilities in the present war, as proclaimed by the President, the charitable deduction prescribed is allowable to corporations even though the gifts or contributions are used outside of the United States or its possessions. Such deductions shall, to the extent provided by that section, be allowed only for the taxable year in which such contributions or gifts are actually paid, regardless of when pledged and regardless of the method of accounting employed by the corporation in keeping its books and records. As to charitable contributions by corporations not deductible under section 23(a), see section 29.23(a)-13. Sums of money expended for lobbying purposes, the promotion or defeat of legislation, the exploitation of propaganda, including advertising

other than trade advertising, and contributions for compaign expenses are not deductible from gross income.

"The provisions of the last paragraph of section 29.23 (o)-1, relating to (1) the statement in returns of the name and address of each organization to which a contribution or gift was made and the amount and the approximate date of the actual payment of the contribution or gift, (2) the substantiation of the claims for deductions when required by the Commissioner, and (3) the basis for calculation of the amount of a contribution or gift which is other than money, are equally applicable to claims for deductions of contributions or gifts by corporation under section 23(q)."

3. The primary provisions of the law permitting sale at wholesale of liquor are contained in Sections 48-305, 48-306 and 48-308, of Ark. Stats., 1947, Ann., copied in pertinent part, as follows:

"48-305. *Wholesaler's permit.*—Any person, other than a distiller, manufacturer or rectifier, may apply to the Commission of Revenues, for a permit to sell spirituous, vinous (except wines) or malt liquors at wholesale. Such application shall be in writing and shall set forth in detail such information concerning the applicant as the Commissioner may require; and shall be accompanied by a certified check, or cash, or postal money order for the amount required by this act for such permit. If the Commissioner shall deny the application he shall return the fee to the applicant and, if the Commissioner shall grant the application, he shall issue a permit in such form as shall be determined by the rules of the Commissioner of Revenues. Such permit shall contain a description of the premises permitted and in form and substance shall be a permit to the person therein specifically designated to sell spirituous, vinous or malt liquors for beverage purposes. . . ." ". . . (Acts 1935, No. 108, Art. 3, § 5, p. 258; Pope's Dig., § 14109.)"

"48-306. *Commissioner not to deny wholesale permit.*—Hereafter, when any person, firm or corporation applies to the Commissioner of Revenue for a permit to sell spirituous, vinous or malt liquors at wholesale and the application filed by such person, firm or corporation conforms to the regulations and the conditions promulgated by the Commissioner of Revenues pertaining to the qualifications essential for the obtaining of such a permit, the Commission of Revenues shall issue such person, firm or corporation a permit to sell at wholesale spirituous, vinous or malt liquors. The Commissioner of Revenues shall not have any authority to deny any such person, firm or corporation a permit to sell spirituous, vinous or malt liquors when such person, firm or corporation has the qualifications required of applicants for such permits. (Acts 1947, No. 429, § 1, p. 1064.)

"48-308. *Refusal to sell to holder of wholesale permit prohibited.*—Hereafter, no distillery doing business in the State of Arkansas, or having salesman or representatives in the State of Arkansas promoting the sale of such distillery's products, shall refuse to sell the products of such distillery to any person, firm or corporation having a permit from the Commissioner of Revenues to engage in the wholesale business of selling spirituous, vinous and malt liquors. . . ." (Acts 1947, No. 429, § 3, p. 1064.)

4. The primary provisions relating to local option were originally contained in Ark. Stats. 48-807, which reads in pertinent part as follows:

"48-807. *Local option under Act of* 1935—*Petition—Election.*—Upon application, by written petition, signed by a number of legal voters in any county, city, town, district or precinct (in Counties having two Judicial Districts, the Legal Voters in either District may petition for an election and said election can only affect the Judicial District where said election may be held) to be affected, equal to thirty-five per cent (35%) of the qualified voters, it shall be the duty

of the judge of the county court in which county at the next regular term thereof, after receiving said petitions, to make an order on his order book directing an election to be held in such county, city, town, district or precinct to be affected thereby, on some day named in said petition no earlier than sixty (60) days after said application is lodged with the judge of said Court, which order shall direct the sheriff, or other officer of said county, who may be appointed to hold said election, to open a poll at each and all of the voting places in such county, city, town, district, or precinct on said date, for the purpose of taking the sense of the legal voters of such county, city, town, district or precinct, who are qualified to vote at elections for county officers, upon the proposition whether or not spirituous, vinous or malt liquors, shall be sold, bartered or loaned therein. (Act 1935, No. 108, Art. 7, § 1, p. 258; Pope's Dig., § 14147.)"

This provision has been largely superseded by Section 48-801, which provides as follows:

"48-801. *Petition for election—Time for holding—Notice.*—When fifteen per cent (15%) of the qualified electors, as shown on the poll-tax records of the County shall petition the County Court of any County within this State, praying that an election be held in a designated County, Township, Municipality, Ward or Precinct, to determine whether or not license shall be granted for the Manufacture or Sale, or the Bartering, Loaning or Giving Away of intoxicating liquor within the designated territory, the County Court, within ten (10) days thereafter, (the County Court shall be open at all times for the purposes of this act) (§§ 48-801-48-806) shall give a public hearing to determine the sufficiency of the petition; and if it be found that fifteen per cent (15%) of the persons who have paid the poll-taxes for the year, making them qualified voters at the time the petition is filed, (or qualified electors in case the qualifications for electors should be changed by Constitutional Amendment) have signed said petition, said County Court

shall order a Special Election to be held in such County, Township, Municipality, Ward or Precinct, to be affected thereby, for the sole and only purpose of voting on the question presented by the petition. Such election shall be not earlier than twenty (20) days nor later than thirty (30) days after the rendition of the Court's decision at said public hearing. Public notice of the purpose and date of such election shall be given by the Sheriff of the County at least ten (10) days before the holding of such election, in accordance with the provisions of section 4672 of Pope's Digest of the Statutes of Arkansas (§ 3-804). (Init. Meas. 1942, No. 1, § 1, Acts 1943, p. 998.)"

5. Amendment No. 7 to the Constitution of Arkansas, approved in the General Election November 20, 1920, provides in pertinent part as follows:

"*No. 7. Initiative and Referendum*

Sec. 1. *Legislative power.*—The legislative power of the people of this State shall be vested in a General Assembly, which shall consist of the Senate and House of Representatives, but the people reserve to themselves the power to propose legislative measures, laws and amendments to the Constitution, and to enact or reject the same at the polls independent of the General Assembly; and also reserve the power, at their own option, to approve or reject at the polls any entire act or any item of an appropriation bill. . . ."

"*State Wide Petitions*

Initiative—The first power reserved by the people is the initiative. Eight per cent of the legal voters may propose any law and ten per cent may propose a Constitutional Amendment by initiative petition, and every such petition shall include the full text of the measure so proposed. Initiative petitions for Statewide measures shall be filed with the Secretary of State not less than four months before the election at which they are to be voted upon; provided, that at least thirty days before the aforementioned filing,

the proposed measure shall have been published once, at the expense of the petitioners, in some paper of general circulation. . . ."

"General Provisions

Definition—The word "measure" as used herein includes any bill, law, resolution, ordinance, charter, constitutional amendment or legislative proposal or enactment of any character.

No Veto—The veto power of the Governor or Mayor shall not extend to measures initiated by or referred to the people.

Amendment and Repeal—No measure approved by a vote of the people shall be amended or repealed by the General Assembly or by any City Council, except upon a yea and nay vote on roll call of two-thirds of all the members elected to each house of the General Assembly, or of the City Council, as the case may be.

Election—All measures initiated by the people, whether for the State, county, city or town, shall be submitted only at the regular elections, either State, congressional or municipal, but referendum petitions may be referred to the people at special elections to be called by the proper official, and such special elections shall be called when fifteen per cent of the legal voters shall petition for such special election, and if the referendum is invoked as to any measure passed by a city or town council, such city or town council may order a special election.

Majority—Any measure submitted to the people as herein provided shall take effect and become a law when approved by a majority of the votes cast upon such measure, and not otherwise, and shall not be required to receive a majority of the electors voting at such elections. Such measures shall be operative on and after the 30th day after the election at which it is approved, unless otherwise specified in the act. This section shall not be construed to deprive any member of the General Assembly of the right to intro-

duce any measure, but no measure shall be submitted to the people by the General Assembly, except a proposed constitutional amendment or amendments as provided for in this Constitution. . . ."

". . . *Self-Executing*—This section shall be self-executing, and all its provisions shall be treated as mandatory, but laws may be enacted to facilitate its operation. No legislation shall be enacted to restrict, hamper or impair the exercise of the rights herein reserved to the people. . . ."

6. Pertinent provisions relating to non-profit corporations are hereafter noted.

ARK. STATS. 1947 ANN.

"64-1301. *Organizations included — Incorporation.* —Any lodge of Freemasons or Odd Fellows, divisions of Sons of Temperance, or any grange of the Patrons of Husbandry, or any co-operative or other association organized for benevolent purposes or for the mutual benefit of its members, or for the promotion of any other good and useful object, or any library company, school, college, medical, mechanical, agricultural or other association organized for the promotion of literature, education, science or art, or any association organized for the promotion of bodily or mental health, and all societies organized to promote either or all of the above named objects, and for all other similar purposes, by whatever name they may be known, consisting of not less than three (3) persons, and also any association of merchants and others in any incorporated city, organized not for pecuniary profit, but as a board of trade or chamber of commerce, or of any special branch thereof, in such city, consisting of not less than nine (9) persons, may be consituted and declared a body politic, and corporate, with all the privileges and powers, and subject to all the liabilities contained in this act (§§ 64-1301-64-1308). (Act Feb. 3, 1875, No. 51, § 1, p. 131; C. & M. Dig., § 1788; Pope's Dig., § 2252.)"

"64-1302. *Articles filed with clerk of circuit court and recorder.*—Any association of persons desirous of becoming incorporated, under the provisions of this act (§§ 64-1301-64-1308), shall file with the Clerk of the Circuit Court and Recorder for the proper county a copy of their constitution or articles of association, and a list of all the members, together with a petition to said court for a certificate of incorporation under the provisions of this act. (Act Feb. 3, 1875, No. 51, § 2, p. 131; C. & M. Dig., § 1789; Pope's Dig., § 2253.)"

"64-1306. *Powers—Management—Right to sue and be sued.*—. . . Such corporation and association shall have the capacity of suing and being sued and is authorized to do any and all things necessary, convenient, useful or incidental to the attainment of its purposes as fully and to the same extent as natural persons lawfully might or could do, as principals, agents, contractors, trustees or otherwise . . ."